IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, | ) | |
| | ) | 2 CA-CR 2006-0080 |
| Appellee, | ) | DEPARTMENT A |
| | ) | |
| v. | ) | MEMORANDUM DECISION |
| | ) | Not for Publication |
| CARLOS ROBLES, | ) | Rule 111, Rules of |
| | ) | the Supreme Court |
| Appellant. | ) | |
| | ) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050205

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED AS MODIFIED

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Terry Goddard, Arizona Attorney General
By Randall M. Howe and Cassie Bray Woo — Phoenix
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Kristine Maish — Tucson
Attorneys for Appellant

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H O W A R D, Presiding Judge.

**¶1** A jury found appellant Carlos Robles guilty of one count each of first-degree murder and attempted first-degree murder. The trial court sentenced him to natural life in prison for the murder followed by a presumptive term of 10.5 years in prison for attempted murder. Robles appeals, arguing that the court erred in failing to suppress an eyewitness identification, that there was insufficient evidence to warrant his convictions, that the court should not have given the *Portillo* instruction on reasonable doubt, that the court abused its discretion at sentencing, and that the natural-life sentence in particular was imposed in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Finding no error, we affirm.[1]

**¶2** We view the facts in the light most favorable to upholding the convictions. *State v. Oaks*, 209 Ariz. 432, ¶ 2, 104 P.3d 163, 164 (App. 2004). Shortly after midnight, Santiago A. was engaged in a physical altercation with various other individuals. During the struggle, Robles fatally shot Santiago in the head. A witness, Juan E., heard the shot, saw Santiago fall to the ground and saw Robles standing by Santiago with a gun. Juan called out, "I know who you are, Carlos Robles." Robles then pointed his gun at Juan and attempted to fire it. The gun apparently jammed, and Juan escaped uninjured. Two other

[1]We note that the sentencing minute entry erroneously states the sentence imposed for the attempted murder is ten years, but the court orally pronounced a presumptive term of 10.5 years. Because the oral pronouncement controls, *see State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999), and because A.R.S. § 13-604(I) sets the presumptive term at 10.5 years, we modify the sentencing minute entry to reflect the correct sentence of 10.5 years for count two, attempted first-degree murder. *See State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990).

witnesses, Michelle V. and Matthew S., also testified at trial that Robles had shot Santiago. A jury convicted Robles of the first-degree murder of Santiago and the attempted first-degree murder of Juan.

**Prior Identification**

**¶3** Robles first argues the trial court erred in denying his motion to suppress both a pretrial identification and any subsequent, in-court identification by Juan E. We review the court's decision regarding identification evidence for an abuse of discretion. *See State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002).

**¶4** Pretrial identifications must be conducted in a fair manner to protect the defendant's right to due process under the Fourteenth Amendment. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 23, 25 P.3d 717, 729 (2001), *citing Stovall v. Denno*, 388 U.S. 293, 297-98, 87 S. Ct. 1967, 1970 (1967). When a defendant challenges identification evidence, the trial court must hold a pretrial hearing to determine its admissibility. *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). The court must first determine whether the procedure used to obtain the identification was unduly suggestive. *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183. If the court finds the procedure was unduly suggestive, it must then determine "whether the identification is reliable in spite of any suggestiveness." *Id*. When determining reliability, the court applies the "so-called *Biggers* test." *Id.* ¶ 48.

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] prior description of the

> criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

*Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382 (1972). The court then weighs these factors against the "'corrupting effect of the suggestive identification itself.'" *Lehr*, 201 Ariz. 509, ¶ 48, 38 P.3d at 1184, *quoting Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977).

**¶5** The evidence at the *Dessureault* hearing showed that Juan E. told the police he knew Carlos Robles personally and had recognized him at the time of the shooting. The police then showed Juan a photograph of Robles, and Juan identified the man in the photograph as Robles and as the shooter. The trial court denied Robles's motion, finding that,

> [t]hough the police employed an inherently suggestive procedure in showing individual photographs of the Defendant . . . to [Juan E.], the identification[] made by him [was] reliable. The witness knew the Defendant by name and recognized him from the neighborhood. He currently [sic] named the Defendant's brother and was aware the Defendant had been incarcerated for a period of time. At the time of the shooting, the witness had ample opportunity to view the Defendant. Under these circumstances, the risk of misidentification is minimal. The State may admit the pretrial identification of the Defendant by the witness and any in-court identification at trial.

When Juan testified at trial, he identified Robles as the shooter in front of the jury.

**¶6** On appeal, Robles argues that the detectives' showing Juan a single photograph was unduly suggestive. We agree that the procedure was inherently suggestive.

*See State v. Cañez*, 202 Ariz. 133, ¶ 47, 42 P.3d 564, 581 (2002). Nevertheless, reliable identifications made after a suggestive pretrial identification will still be admitted. *Id.* Here, the trial court found the identification reliable.

**¶7** Robles argues, however, that the trial court erred because one of the factors set forth in *Biggers*, the accuracy of any description by the witness, "was *completely lacking*." But the *Biggers* analysis is, as Robles concedes, a totality-of-the-circumstances test. *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382. The factors set forth in *Biggers* are not required elements, and the list is not exhaustive. *See, e.g., State v. Alvarez*, 145 Ariz. 370, 372, 701 P.2d 1178, 1180 (1985) (applying some but not all *Biggers* factors in finding a pretrial identification reliable). Juan testified at the hearing that he knew Robles personally and identified him as the shooter based on this knowledge. Therefore, the trial court could find that Juan's failure to provide a description of Robles before viewing the photograph did not render the identification unreliable.

**¶8** Robles also suggests that Juan was distracted at the time of the shooting because he was focused on the victim and because there were other people involved in the altercation. But testimony at the *Dessureault* hearing supports the court's finding that Juan had "ample opportunity to view the Defendant." After Robles shot Santiago, Juan called out Robles's name and then saw Robles aim his gun directly at Juan in an apparent attempt to shoot him. "[W]here a victim rivets [his] attention upon [his] attacker, the reliability of

[his] subsequent identification . . . is enhanced." *Alvarez*, 145 Ariz. at 372, 701 P.2d at 1180.

**¶9** Robles further suggests that, because Juan waited to make his identification until the police questioned him a few hours after the incident instead of coming forward immediately after the shooting, the certainty of his identification of Robles should be doubted. The trial court did not make a finding regarding the length of time between the event and the identification, but again, this is only one of several factors in the *Biggers* analysis, and was not essential for the court to determine reliability. Furthermore, once Juan's identification met the standard for admissibility, any challenges to the identification were for the jury to consider. *See State v. Prion*, 203 Ariz. 157, ¶¶ 16, 18, 52 P.3d 189, 192-93 (2002). We conclude the trial court did not abuse its discretion in ruling that the pretrial identification and any subsequent, in-court identification by Juan E. were admissible.

**Sufficiency of the Evidence**

**¶10** Claiming there was insufficient evidence to sustain his convictions, Robles next argues the trial court erred by denying his motion pursuant to Rule 20, Ariz. R. Crim. P., for a judgment of acquittal. He contends the "utter unreliability of the eyewitness[es]" and "a complete lack of forensic evidence tying [Robles] to the crimes" render the evidence insufficient to support the convictions.

**¶11** A trial court's denial of a motion for judgment of acquittal on the basis of insufficient evidence is reversible error "'only where there is a complete absence of probative

facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976); *see also State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) ("To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury."). Further, the jury must determine the credibility of the witnesses, and we will not disturb that determination as long as there is "substantial supporting evidence." *Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624. We view that evidence in the light most favorable to sustaining the jury's verdict. *State v. Dixon*, 216 Ariz. 18, ¶ 10, 162 P.3d 657, 660 (App. 2007).

**¶12** Three eyewitnesses, Juan E., Michelle V., and Matthew S., identified Robles as the person who shot Santiago. As to the attempted shooting, one eyewitness, Juan himself, identified Robles as his attacker. Their testimony constitutes substantial evidence to support Robles's convictions. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005) (testimony of single eyewitness was substantial evidence, even when contradicted by testimony of other witnesses).

**¶13** Nevertheless, Robles attacks the credibility of each witness, primarily by noting inconsistencies in their testimony and by suggesting bias based on their relationships to the victim and their affiliations with rival gangs. The trial transcripts reflect that Robles's counsel examined all three witnesses and that these issues were brought out for the jury to consider. Any issue as to the witnesses' credibility was for the jury to resolve. *See Soto-*

*Fong*, 187 Ariz. at 200, 928 P.2d at 624. Accordingly, the trial court did not err in denying Robles's Rule 20 motion.

### *Portillo* Instruction

**¶14** Robles next argues the court erred in giving the jury instruction on reasonable doubt mandated in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). Because our supreme court has rejected similar arguments challenging this instruction, *see State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916, *cert. denied*, ___ U.S. ___, 127 S. Ct. 506 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003), the trial court did not err in giving the *Portillo* instruction.

### Excessive Sentence

**¶15** Robles also argues that the trial court abused its discretion by imposing a sentence of natural life in prison followed by a consecutive term of 10.5 years.[2] When a sentence falls within the limits set by statute, we review the trial court's decision only for an abuse of discretion. *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). "'[A] reviewing court may find abuse of discretion when the sentencing decision is arbitrary or capricious, or when the court fails to conduct an adequate investigation into the facts

[2]Although Robles refers in passing to both the natural-life sentence and the consecutive term of 10.5 years, he substantively discusses only the propriety of the natural-life sentence. We thus find Robles has waived any argument regarding the 10.5-year term by failing to develop it adequately. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

relevant to sentencing.'" *Id.* ¶ 6, *quoting State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (alteration in *Ward*).

**¶16** When determining a prison sentence for first-degree murder, the trial court may impose either a life sentence, with the possibility of release in twenty-five years, or a natural-life sentence, with no possibility of release. *See State v. Fell*, 210 Ariz. 554, ¶¶ 14-15, 115 P.3d 594, 598 (2005). Section 13-703.01(Q), A.R.S., provides:

> In determining whether to impose a sentence of life or natural life, the court:
>
> 1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.
>
> 2. Shall consider the aggravating and mitigating circumstances listed in § 13-702 and any statement made by a victim.

However, the court is not required to make a finding of any aggravating factors when imposing a natural-life sentence. *See Fell*, 210 Ariz. 554, ¶¶ 14-15, 115 P.3d at 598. Nor must the court "articulate the factors it considered in choosing to impose a natural-life sentence." *State v. Guytan*, 192 Ariz. 514, ¶ 42, 968 P.2d 587, 597 (App. 1998).

**¶17** Before rendering sentence, the trial court stated:

> I'm aware of the circumstances that led to this killing, and I understand your lawyer's argument, but what I find very compelling in this case is the—the record you have for dangerous offenses. The drive-by shooting, the aggravated assault conviction, and that you were on parole, so I think those factors outweigh the factors that your lawyer suggests that the circumstances here were somewhat unique.

Thus, even though not required to do so, the court stated its reasons for imposing a sentence of natural life.

**¶18** On appeal, Robles argues it was improper for the trial court to have considered two prior felony convictions in sentencing him to a natural-life term because he had committed those felonies within a few months of each other, and thus they were "not separated by an intervening opportunity to reform." As noted above, § 13-703.01(Q) provides that the court shall consider the aggravating circumstances listed in § 13-702 when deciding between sentences of life or natural life. Under § 13-702(C)(11), the court may properly find aggravating the fact that a defendant has been convicted of other felonies within ten years of the present offense. Robles does not cite any Arizona authority that would require prior felonies to be temporally separated in order to give the defendant an opportunity to reform before such convictions can be considered at sentencing. And *Commonwealth v. Bell*, 901 A.2d 1033 (Pa. Super. Ct. 2006), on which Robles relies, actually reaches a result directly contrary to his position. Thus, it was not improper for the court to consider that Robles had two violent felony convictions in rendering its decision.

**¶19** Robles further argues there were substantial mitigating circumstances that justified a sentence of life imprisonment with some possibility of release. Although the trial court was required to consider evidence offered in mitigation, it was not required to find such evidence actually mitigating. *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986). The first mitigating circumstance Robles argues on appeal is the issue of

relative culpability of the victim, an argument that he also raised at the sentencing hearing. In rendering its decision, the trial court acknowledged it had considered the mitigating arguments made by Robles but found they were outweighed by his prior felony convictions. This determination was within the court's discretion. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998) (trial court has discretion to weigh aggravating and mitigating factors).

**¶20** The other mitigating circumstances Robles asserts include residual doubt because his convictions were based solely on eyewitness identification, a history of substance abuse and mental illness, work and educational achievement as well as strong family support. Robles failed to raise any of these issues at the sentencing hearing and has therefore forfeited the right to raise them on appeal absent fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because Robles does not argue that fundamental error occurred, we will not address the issue of this mitigation evidence. *Id.* (defendant has burden of persuasion in fundamental error review).

**¶21** In sum, we conclude the trial court did not abuse its discretion in sentencing Robles. Additionally, we do not find that "the punishment imposed is greater than under the circumstances of the case ought to be inflicted," A.R.S. § 13-4037(B), and reject Robles's request that we reduce his sentence pursuant to that statute.

## ***Blakely*** **Claim**

**¶22** Finally, Robles contends that, because the jury did not find any aggravating factors, his sentence of natural life violated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). As Robles concedes, our supreme court has addressed this issue and has held that a court may impose a sentence of either life or natural life once a jury has found a defendant guilty of first-degree murder. *State v. Fell*, 210 Ariz. 554, ¶¶ 14-15, 115 P.3d 594, 598 (2005). "[T]he Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed." *Id.* ¶ 19. Thus, the trial court did not err in imposing a natural-life sentence based on the jury's guilty verdict.

**Conclusion**

**¶23** For the foregoing reasons, we affirm Robles's convictions and the sentence of natural life for first-degree murder. We also modify the sentencing minute entry to reflect that the sentence actually imposed for attempted murder was 10.5 years, to be served consecutively to Robles's natural life sentence, and we affirm that sentence.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge